STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

McLEODUSA TELECOMMUNICATIONS SERVICES, INC.	)	
	)	
Complainant	)	
	)	
	)	**Docket 00-0107**
COMPLAINT AGAINST ILLINOIS BELL TELEPHONE COMPANY D/B/A AMERITECH ILLINOIS UNDER SECTIONS 13-514 AND 13-515 OF THE PUBLIC UTILITIES ACT CONCERNING THE IMPOSITION OF SPECIAL CONSTRUCTION CHARGES AND SEEKING EMERGENCY RELIEF PURSUANT TO SECTION 13-515(e)	)	

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S RESPONSE IN OPPOSITION TO MOTION TO FILE INSTANTER OR IN THE ALTERNATIVE REPLY TO AMERITECH'S OPPOSITION TO EMERGENCY RELIEF

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by its undersigned attorneys, files this response in opposition to motion to file instanter or in the alternative its reply to Ameritech's opposition to McLeodUSA's request for emergency relief. The Commission must grant McLeodUSA's request for emergency relief,

INTRODUCTION

McLeodUSA's Complaint in this Docket concerns Ameritech's unilateral imposition of special construction charges associated with the provision of unbundled network elements ("UNEs"). Ameritech assesses these charges without any regulatorv oversight. This fact is evidenced by Ameritech's repeated changes to its special construction charge policy, which Ameritech does not deny. The only constant to that policy is that Ameritech

continues to demand special construction charges in the instance of loops served by integrated digital loop carriers ("IDLCs") or remote switching units ("RSUs"). McLeodUSA did not lie about Ameritech's policy, as Ameritech claims.' Neither would McLeodUSA be acting reasonably were it to rely upon oral statements by Ameritech's attorney as to what charges and practices are applicable, especially when Ameritech's actions show otherwise.

Ameritech has ignored the statutory requirements for the grant of emergency relief under Section 13-515 by erecting several strawman, each of which is knocked down below. The Complaint is not "premature." Neither does it matter that Ameritech talked with McLeodUSA about settling this dispute. Ameritech and McLeodUSA have not settled this dispute. Section 13-515 provides for emergency relief if the three statutory criteria have been met, and McLeodUSA has met its burden under Section 13-515(e) by making a "verified factual showing" that it will "likely succeed on the merits. will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest."

ARGUMENT

I. Ameritech's Motion To File Instanter Must Be Denied.

Ameritech filed its Opposition late, but filed a Motion for Leave to File instanter, alleging that "no party will be prejudiced by this request" since the "Commission's rules do not provide for any response to the Opposition." (Motion, para. 4) This allegation is flat-

'McLeodUSA explicitly stated that Ameritech's lawyer indicated that a new change was forthcoming. (See Complaint, para. 8, fn. 3)

out wrong. McLeodUSA has been prejudiced by Ameritech's tardiness, and the Motion should therefore be denied.

Ameritech claims that McLeodUSA would not be harmed by granting Ameritech's motion since McLeodUSA has no right to file a reply. (Ameritech Motion, para. 4) Ameritech is wrong; McLeodUSA is entitled to file this Reply. Section 13-515(d)(5) permits a complainant to file a reply to any responsive pleading filed under Section 13-515(d)(4) of the PUA where such response raises the issue that complainant violated subsection (i) of Section 13-515 of the PUA. That section provides, among other things, that when a party brings a complaint that party is certifying that "to the best of that party's knowledge, information, and belief, formed after a reasonable inquiry of the subject matter of the complaint that the complaint is well grounded in law and fact." 220 ILCS 5/13-515(i). **Ameritech raises this** very **issue** at page 7 of its Opposition by referring specifically to Section 13-515(i). Therefore, McLeodUSA has the absolute right to file this Reply, and even a delay of several hours was prejudicial given the short time-frames involved.[2]

For these reasons, Ameritech's claim that its Motion would not prejudice McLeodUSA is wrong, and the Motion should therefore be denied and Ameritech's Opposition to McLeodUSA's request for emergency relief should be stricken.

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[2]It should be noted that the Opposition was delivered to a secretary via e-mail, rather than to either attorney handling this case. While this may not have been a strategic decision on Ameritech's part, the effect is no different than if it had been. The fact of the matter is that the drafting of this Reply could not begin until the morning of February 2, 2000, partially as a result of Ameritech's tardiness and its decision to serve a secretary instead of the attorneys involved in the case.

II. McLeodUSA Has Carried Its Burden Under Section 13-515(e) Of The PUA.

A. Likelihood Of Success On The Merits.

McLeodUSA explained in its Request for Emergency Relief that it will likely succeed on the merits because Ovation succeeded in Docket 99-0525 and the allegations in the Complaint in Docket 99-0525 are substantively identical to those made in the Complaint which initiated this Docket. Ameritech's efforts to distinguish the cases are baseless.

The only differences between the claims in the Ovation case and this case are irrelevant to the issues at hand, i.e., that Ameritech has modified its policy (although Ameritech continues to charge special construction for provisioning loops served by IDLCs) and additional incidents have arisen in which Ameritech has sought to collect special construction charges from McLeodUSA. If one were to accept Ameritech's allegation that it is not charging a fixed fee for special construction for the work described in paragraph 7 of the Complaint, then Ameritech should not object to an emergency order documenting that practice. If that allegation is not accepted as true, then McLeodUSA will likely succeed on the merits on this issue since the Commission concluded only several weeks ago in Docket 99-0525 that Ameritech's policy of assessing special construction charges in those instances was inappropriate. The same is true with respect to special construction charges in the instance in which loops served by IDLCs are provisioned --the Commission prohibited such charges. Thus, there is a strong likelihood that McLeodUSA will likely succeed on the merits on that issue just as Ovation did in Docket 99-0525. McLeodUSA has therefore met its burden.

The reason that McLeodUSA is seeking emergency relief is because Ameritech has made its special construction charge policy a moving target that is totally unregulated. Ameritech has changed its special construction charge policy at least three times since the Ovation order was issued. On January 4, 2000, shortly after issuance of the order, Ameritech unveiled to all CLECs, including McLeodUSA, a new unbundled loop provisioning policy. On January 12, 2000, Ameritech apparently instituted a further modification of its policy under which it automatically cancels CLEC orders if they do not meet Ameritech's definition of available and requires issuance of a bona fide request ("BFR"). Ameritech canceled McLeodUSA orders under its new policy. Indeed, Ameritech did so even before its new policy was published on its website. And, Ameritech's counsel stated on the record in a status hearing in Docket 99-0593 on January 25, 2000, that this new policy is again being changed.[3] How can McLeodUSA do business under these circumstances?

Significantly one thing remained the same under all incarnations of Ameritech's special construction charge policy since the Ovation order: **Ameritech continues to charge special construction for provisioning loops served by IDLCs**. Special construction charges in such a circumstance are prohibited in the Ovation order

[3]Ameritech essentially argues that those allegations of McLeodUSA's Complaint which deal with the new Ameritech policy are much ado about nothing inasmuch as Ameritech does not currently impose any flat fee for certain modifications of available facilities to prepare them for unbundling. (See Ameritech Response, p. 7) ("Ameritech Illinois has removed any flat fee for such modifications") (emphasis added). This is nothing but an Ameritech strawman. Whether fixed fees are charged is not dispositive of this case. Moreover, what Ameritech fails to note is that it would not have had to remove flat fees from its new policy if it had not added them after issuance of the order in Docket 99-0525 in the first place.

Ameritech again seeks to hide behind its interconnection agreement with McLeodUSA in arguing that this matter is not ripe for dispute. (See Ameritech Opposition, p. 6) First, the Commission has already rejected that argument and determined that Ovation's virtually identical claims did not involve disputed amounts pursuant to an interconnection agreement and therefore the contractual dispute escalation provisions were not applicable. (See Order, Docket 99-0525, p. 6)

Second, and most importantly, Ameritech's argument is belied by Ameritech's other arguments. If Ameritech is correct that the issues raised by the request for emergency relief will be resolved in the generic investigation --which it is not--then clearly the issue relates to Ameritech's practices and its tariff, not its interconnection agreement with McLeodUSA, since that interconnection agreement is not the subject of the generic investigation, Moreover, the generic investigation is designed to address the issue of special construction charges generally with respect to all CLECs, each of which operates under a different interconnection agreement. This fact establishes that the Commission does not view the issue as relating to or hinging on any interconnection agreement, let along McLeodUSA's agreement, Any other conclusion would render the Commission's order in the generic case meaningless.

Ameritech seeks to blur the distinction between McLeodUSA's requests for emergency and permanent relief wherein it claims that McLeodUSA's Complaint is "premature" since the generic investigation is ongoing. (Ameritech Opposition, p. 4) In its request for emergency relief, which is all that is before the Commission at this'time, McLeodUSA is seeking an order prohibiting Ameritech from charging special construction

charges (except with respect to conditioning for xDSL service), consistent with the Commission's order in Docket 99-0525, pending an order in the generic investiuation case and a final order in this case. The generic investigation simply will not provide the relief that an emergency order in this case would provide.[4]

The cases cited by Ameritech in support of its "premature" argument are irrelevant since none were brought under Sections 13-514 and 13-515. These statutes provide the Commission explicit enforcement authority under which McLeodUSA has sought relief. The statute provides no exception such as the one asserted by Ameritech. In any event, since the relief sought by McLeodUSA in this Complaint will not be granted in the generic investigation, Ameritech's argument is simply ill-premised. The Commission must reject Ameritech's suggestion that the generic investigation is a reason for the Commission not to hear this case, and a reason to allow Ameritech to continue to improperly recover special construction charges.

Ameritech's claim that it offered to settle this matter is meaningless. What **Ameritech says and what it does are two different things** -- as the Commission well knows. While Ameritech's attorney offered to submit proposed contract language to McLeodUSA in an effort to settle this matter after he received McLeodUSA's January 12th 48 hour notice letter, and never did so. McLeodUSA waited over two weeks for such language before filing this Complaint. How long must McLeodUSA be forced to wait for

[4]With regard to the request for permanent relief, McLeodUSA does not expect to be entitled to a refund in the generic investigation case, and Ameritech does not claim otherwise. Thus, the generic investigation will not provide the permanent relief requested by McLeodUSA in this Complaint,

action on the part of Ameritech? The statute says 48 hours. See 220 ILCS 5/1 3-515(c). McLeodUSA did so. Significantly, Ameritech never offered to pay refunds for amounts McLeodUSA believes it wrongly paid, and it is clear from Ameritech's footnote that it will likely argue that no refunds are appropriate. (See Ameritech Opposition, fn. 2) What more could McLeodUSA have done?

Similarly irrelevant is Ameritech's claim that this Complaint cannot go forward since the parties are renegotiating their agreement. (Ameritech Opposition, p. 5) While Ameritech has been aware since October that McLeodUSA has an issue with respect to special construction charges, so long as the 48 hour notice provision is met (as it has been here), McLeodUSA is not barred from filing this claim since, as the Commission concluded in its final order in Docket 99-0525, this matter concerns Ameritech's practices and its tariff, not its interconnection agreement. Indeed, as noted below, Ameritech essentially concedes this point by claiming that the issues raised by this Complaint are being resolved in the generic investigation case. Rhythms Link, Docket 99-0465, (cited by Ameritech at page 5) is inapposite since it involved a required modification to Ameritech's tariff called for by an FCC order as to which the parties entered into negotiations as opposed to a practice in which Ameritech engages reaardless of the particular interconnection agreement under which the carrier is purchasing UNEs.

In sum, McLeodUSA has established a likelihood of success on the merits, and Ameritech has not proven otherwise.

B. Irreparable Harm Has Been Shown.

McLeodUSA has satisfied the dictate of Section 13-515(e) to make a "verified factual showing" that it will suffer irreparable harm absent emergency relief by filing a verified complaint.[5]

Ameritech suggests that because "it is not doing the things of which it is accused or in any way violating the Ovation decision, McLeodUSA is not likely to suffer any irreparable harm if its request is denied and the status quo is maintained." This argument puts the cart before the horse. As explained above, Ameritech is charging rates and charges and engaging in a practice that is currently unregulated and anti-competitive. The Commission recently reached the same conclusion in Docket 99-0525. This is true under Ameritech's old policy, its revised policy and its current policy.

Ameritech begs the question when it comes to the showing of irreparable harm. McLeodUSA alleged that every day Ameritech is permitted to charge McLeodUSA for special construction for loops provisioned via IDLC or RSU, McLeodUSA must turn away customers. This alone constitutes an irreparable injury, since it is well settled that an averment of loss of business alone is sufficient allegation of irreparable injury to establish a right to injunctive relief. Eppers v. First Nat. Bank of Lake Forest, 151 Ill. App. 3d 902, 910 (2nd Dist. 1987). As stated in Falcon, Ltd. v. Corr's Natural Beverages, Inc., 165 Ill. App. 3d 815, 820-821 (1987):

'Ameritech suggests that this provision requires something more even though it implicitly demonstrated that it understands what a "verified factual showing" actually means, by filing of a verified opposition. Moreover, Ameritech cites no authority to controvert what McLeodUSA stated in its Complaint: its burden is merely "preponderance of the evidence."

> An injury is "irreparable" when it is of such a nature that the injured party cannot be adequately compensated in damages or when damages cannot be measured in any pecuniary standard. The loss of sales and customers as well as the threat of continuation of such losses of a legitimate business interest, asalleged by plaintiffs in the present case, have been held sufficient to constitute irreparable injury. Therefore, injunctive relief was warranted.

Here, damages alone will never be able to effectively redress McLeodUSA's loss of customers, since in many instances McLeodUSA has refused to pay the special construction charges demanded by Ameritech and thus turned away customers. Ameritech never addresses this point. As explained in its Complaint, once a customer is turned away, McLeodUSA's reputation is forever damaged. This is particularly true in the current market where McLeodUSA's most significant competitor, Ameritech, counts among its assets about a century of history and goodwill. Moreover, there is no way to ever know how many would-be customers each turned-away customer would have referred to McLeodUSA had McLeodUSA been able to compete on the basis of service and had not been handicapped by a pricing methodology and practice that enables Ameritech to offer the identical service as McLeodUSA at a lower price every time. This loss of reputation, by itself, presents an independent basis on which the Commission must find irreparable harm. Falcon, Ltd. v. Corr's Natural Beveraaes. Inc., 165 Ill. App. 3d at 821 ("While immediate damages in loss of commissions may be calculable, the injury to plaintiffs' reputation and good will, and the resulting loss of existing and future business, is incalculable").

Simply put, irreparable harm has been shown. Emergency relief must be granted

C. The Public Interest Test Has Been Met.

In its Request for Emergency Relief, McLeodUSA stated:

> Granting emergency relief would be in the public interest. Requiring Ameritech to immediately cease and desist from applying its new special construction charge policy and instead to comply with the recent statement of Commission policy concerning special construction will enhance local competition, a result which will benefit the public. This is the paramount goal of the Telecommunications Act of 1996. Moreover, it is in the public interest to require Ameritech to comply with a Commission order, i.e., the Ovation Complaint Order. Thus, this prong of the statutory standard is met.

This allegation bears repeating only because Ameritech totally ignores it, does not make any attempt to refute it, and argues instead that the granting of emergency relief would not be in the public interest because such an order would encourage other CLECs to file complaints under Section 13-514, and that would be a burden on the "Commission, its staff, and all carriers." (Ameritech Opposition, p. 9) While Ameritech's concern is heartwarming, it does not address the "public interest" prong of the test, but instead raises an issue akin to judicial economy. Unfortunately for Ameritech, the statute does not direct the Commission to consider this factor in making its determination, The factor to consider is whether emergency relief would be in the public interest.' Ameritech has not disproved McLeodUSA's allegations that emergency relief in this case is in the public interest.'

'Black's Law Dictionary (6th ed. 1990) defines "public interest as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected."

[7]Ameritech's argument with respect to the "public interest" prong of the test is essentially a re-hash of its argument that the Complaint is premature, both in light of the pending generic investigation and the pending negotiations the parties are conducting, which arguments have been refuted in Section II.A, above.

CONCLUSION

WHEREFORE, McLeodUSA Telecommunications Services, Inc. respectfully requests that the Commission deny Ameritech's motion to late file its opposition. The Commission must grant the request for emergency relief. While Ameritech's policy regarding special construction may have been changed, special construction charges continue to be assessed and delays continue to be experienced. McLeodUSA must still attempt to operate in an environment where its cost of providing service to an end user is not known until after service is installed and where there is no regulatory oversight over the costs Ameritech seeks to recover from McLeodUSA. For all these reasons, the Commission must grant the requested relief and again assert regulatory oversight over Ameritech's special construction charges.

Dated: February 2, 2000

Respectfully submitted,

McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

Carrie J. Hightman
Jonathan P. Friedland
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5657

Counsel for
McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

William Haas
Associate General Counsel
McLEODUSA INCORPORATED
McLeodUSA Technology Park
6400 C Street SW
P.O. Box 3177
Cedar Rapids, Iowa 52406-3177
(319) 790-7295

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CERTIFICATE OF SERVICE

The undersigned attorney for McLeodUSA Telecommunications Services, Inc. hereby certifies that she caused copies of the attached McLeodUSA Telecommunications Services, Inc.'s Response in Opposition To Motion To File Instanter Or In The Alternative Reply To Ameritech's Opposition To Emergency Relief to be served on the persons listed below electronically on February 2, 2000, followed by delivery in the manner indicated on February 3, 2000:

John Albers
Hearing Examiner
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62706
[VIA FACSIMILE FOLLOWED BY FEDERAL EXPRESS]

Andrew Huckman
Illinois Commerce Commission
160 N. LaSalle Street
C-800
Chicago, IL 60601
[VIA MESSENGER]

Mark Kerber
Illinois Bell Telephone Company d/b/a Ameritech Illinois
225 W. Randolph Street
Suite 27B
Chicago, IL 60606
[VIA MESSENGER]

Christian F. Binnig
J. Tyson Covey
Mayer, Brown & Platt
190 So. La Salle Street
Chicago, IL 60603
[VIA MESSENGER]

Carrie J. Hightman

Attorney for
McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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